SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

No. 74-801

OCTOBER TERM — 1974

JOSEPH MAURO,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM — 1974

No. _____

JOSEPH MAURO,

Petitioner.

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

The petitioner, Joseph Mauro, prays that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit entered November 25, 1974, which affirmed the judgment of the United States District Court, Eastern District of New York, whereby petitioner was convicted after trial before a court and jury, under counts 1, 2 and 4 of indictment having docket number 72 C.R. 858. These counts related to the possession and concealment of counterfeit U.S. Federal Reserve Notes, in violation of 18 U.S.C. 472 (count 1 of the indictment); the transferring and delivery of counterfeit

money in violation of 18 U.S.C. 473 (count 2 of the indictment); and a conspiracy engaged in with one Louis J. Stopfello, to possess, conceal and sell counterfeit obligations and securities of the United States, in violation of 18 U.S.C. 371 (count 4 of the indictment).

As a consequence of the said conviction the said petitioner was sentenced July 26, 1974 as follows: two concurrent two (2) year jail terms on the second and fourth counts of the indictment; the petitioner was placed on probation under the first count of the indictment. The jail terms were to commence after completion of a sentence that was heretofore imposed upon the said petitioner upon his conviction in the United States District Court, Southern District of New York, for a violation of 18 U.S.C. 371 and for possession of stolen bank property under 18 U.S.C. 2123. That sentence was comprised of concurrent three (3) year jail terms.

THE OPINION OF THE COURT BELOW:

The opinion of the court below, to wit, the United States Court of Appeals for the Second Circuit, is set forth below in Appendix A.

The opinion and decision of the United States District Court, Eastern District of New York, denying a motion to suppress the evidence (4th Amendment to the United States Constitution) is set forth below in Appendix B.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Second Circuit, affirming the conviction, is

dated November 25, 1974 and the jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED:

1. Were the courts below correct in denying a motion to suppress the evidence found in a car possessed by the petitioner because the motion was not timely, the Court of Appeals for the Second Circuit holding that Rule 41 of the Rules of Criminal Procedure in effect, permits that motion to be made during trial but that Rule 12(b)(3) of the proposed amendments to the Federal Rules of Criminal Procedure for the United States District Courts, effective August 1, 1975, does not permit said motion to be made during trial, the proposed rule providing it must be made before trial?

2. Was the warrantless seizure of a car driven by the petitioner at the time of the petitioner's arrest, January 4, 1972, in conformity to the 4th Amendment to the Federal Constitution and was the subsequent dismantling of the car which the authorities seized and found counterfeit money, reasonable when at such time a magistrate for the Eastern District of New York directed a dismissal of the charges and the charges were dismissed?

3. Was the initial seizure of the car reasonable under the said 4th Amendment to the Federal Constitution where there was no showing or proof that the car contained any counterfeit money or was used to facilitate the possession and transfer of the said counterfeit money at the time of the said initial seizure?

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

The Constitution of the United States, Amendment IV:

"Searches and Seizures:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

49 U.S.C. 781: "Contraband Articles — Transportation — Definitions — (a) It shall be unlawful (1) to transport, carry or convey any contraband article in, upon or by any means of any . . . vehicle, . . .; (2) to conceal or possess any contraband article in or upon . . ., vehicle, . . ., or upon the person of anyone in or upon any . . ., vehicle . . .; or (3) to use any vehicle to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange or giving away of any contraband article."

* * *

"(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security."

Rules of Criminal Procedure

"Rule 41

Search and Seizure (a)***(b)***(c)***(d)***(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the District Court for the District in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for a hearing in the District of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

"(f) Motion to Suppress. A motion to suppress evidence may be made in the Court of the District of trial as provided in Rule 12."

Rule 12.

"Pleadings and Motions Before Trial; Defenses and Objections"

"(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them

shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

"(b) The Motion Raising Defenses and Objections. (1) Defenses and Objections Which May be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

"(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendence of the proceeding.

"(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a

jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

"(5) Effect of Determination. If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations."

Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts:

"The following proposed amendments were transmitted to Congress on April 22, 1974 by the Chief Justice of the United States pursuant to an order of the Supreme Court of the United States. Paragraph 2 of the order provided that the proposed amendments were to take effect on August 1, 1974. Pub. L. 93-361, July 30, 1974, 88 Stat. 397, provided: 'That, notwithstanding the provisions of sections 3771 and 3772 of title 18 of the United States Code, the effective date of the proposed amendments to the Federal Rules of Criminal Procedure which are embraced by the order entered by the United States Supreme Court

on April 22, 1974, and which were transmitted to the Congress by the Chief Justice on April 22, 1974, is postponed until August 1, 1974."

Rule 12.

"Pleadings and Motions Before Trial; Defenses and Objections. * * * "(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * *

"(3) Motions to suppress evidence; or

* * *

STATEMENT OF THE CASE

At the outset and for the Court's convenience, it is brought to this Court's attention that the indictment herein was consolidated with another indictment charging the petitioner with other crimes. That indictment bears number 72 CR 857 and charged the petitioner with violating 18 U.S.C. 894(a) the illegal extension of credit. Trial under that indictment was therefore consolidated with the trial which this Court is now concerned with. However, the same jury that convicted the petitioner under the indictment at issue, acquitted the petitioner of violating 18 U.S.C. 894(a).

The basic issues presented here relate to the seizure of the petitioner's car when he was initially arrested January 4, 1972. However, objectivity would require that this Court be made aware of the salient facts leading to the

petitioner's arrest, and the seizure of the car, the holding of the car for about two (2) months by the authorities, the dismantling of a portion of the car, whereby counterfeit money was found concealed therein.

According to a government witness named Louis Stoppiello the petitioner prior to October 1971 was lending him money. Stoppiello fell behind in payments. The petitioner and Stoppiello discussed ways that repayment could be made (A6, A10, A11).* In October 1971 Stoppiello and the petitioner discussed the distribution of counterfeit money whereby the witness in transferring such counterfeit money was to be credited in regard to the accrued interest due the petitioner (A16, A17). This witness, however, never kept records of any loans that were allegedly made by the petitioner to him (A17, A18).

In October and November of 1971 the petitioner was said by Stoppiello to have given him counterfeit money (A18, A19). The witness could not recall how much of this counterfeit money he disposed of (A20, A21). In December 1971 the witness claimed that the petitioner told him that he had new and better counterfeit currency; that the present stock of the spurious currency was inferior (A11-A24). Thereupon, the petitioner gave this witness some spurious currency (A24). That day Stoppiello went to the hospital (A24, A25).

On December 10, 1971 Stoppiello while at the hospital met a person named to him as "Mickey" (A25). Stoppiello related that he met "Mickey" through "Sal", a person who was instrumental in getting loans from the petitioner for

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*( ) This refers to the pagination of the appendix submitted to the Court below.

Stoppiello (A25, A26, A29). While at the hospital this witness had spurious currency and he actually gave some to "Mickey". He also discussed future transactions with "Mickey" (A30, A31, A33).

Following Stoppiello's discharge from the hospital on December 17, 1971 he again met "Mickey", this time on December 30, 1971 (A33, A34). On this occasion he sold him some counterfeit money (A34). "Mickey" told Stoppiello that "his people" were pleased with the prior purchases and wanted to make a larger one (A36). "Mickey" and the witness, Stoppiello, then agreed to transact the sale for spurious currency denominated $5,000 for which the consideration was to be $1,250. This was to occur on January 4, 1972 (A37). Stoppiello thereupon called the petitioner and informed him of this possible transaction (A37, A38).

Pursuant to an arrangement with the petitioner, Stoppiello met the petitioner on January 4, 1972. The petitioner was accompanied by a friend of his named Lenny Bilts. The place of meeting was "Anton's Luncheonette" (A39). The petitioner and his friend were suspicious of "Mickey", the buyer, and thereupon they discussed means to ascertain whether the authorities were involved. In other words, according to Stoppiello the witness and the petitioner were going to substitute ordinary paper for the currency to ascertain whether the authorities were investigating the case (A40, A41). However, "Mickey" did not come at the designated time and therefore Stoppiello called him. Stoppiello was told that the buyer for the currency would come later that day at 2:00 P.M. (A41). Mauro, the petitioner, also allegedly told the witness that he was to pass the currency with "Sal" (A42). There upon, according to Stoppiello, the petitioner told him to go to the

petitioner's car and take the currency from the back seat (A43-A45). Stoppiello identified the car as a 1971 or 1972 Mustang (A44). Thereupon Stoppiello retrieved the counterfeit from the petitioner's car (A45). Stoppiello secreted the money in a nearby apartment house (A45, A46).

Meanwhile "Sal" arrived with "Mickey" (A46).

Ultimately this witness saw the arrest of the petitioner and others (A46, A47). Later that day this witness was also arrested (A48).

Stoppiello also testified that after he was arrested he spoke to the petitioner about an agent named Whitaker (A50). The petitioner accused him of "setting him up" (A50, A51). Further, that the petitioner told him that his attorney read a government report showing that the petitioner's car was impounded (A51).

This witness also testified that he saw counterfeit currency in the petitioner's car on different occasions (A52). He told the ptitioner he would not pay off the loan because he was going to take the "bust" for him (A52).

Michael Riley called by the government, testified that he was an agent with the United States Secret Service (A53). He acted as an undercover agent, that is, he would pose as a participant in a criminal transaction, so as to effectuate a successful investigation of a suspect (A53, A54). That on December 3, 1971 he met a person named Sal Seminaro who gave him three $10.00 counterfeit bills (A54). Seminaro was a government informer (A55, A56). He initially met Sal Seminaro December 10, 1971 and went to the Veterans Hospital (A56, A57). There he met Stop-

piello, the previous witness (A56, A57, A59). Stoppiello told this witness that he had spurious currency; Riley, the witness, asked to see them and Stoppiello displayed them to him. As a matter of fact he sold him some (A59, A60, A61).

These exhibits were admitted in evidence as government's exhibit 11 (A64).

Riley recounted that he had a discussion with Stoppiello as to future transactions (A64-A66). Stoppiello referred to one "Joe" as his source (A66). Later Riley spoke to Stoppiello about more transactions and Stoppiello told him that he spoke to "Joe" about a purchase of $10,000 spurious currency at a price of $27.00 or every $100.00 spurious bill (A66).

Later this witness met Stoppiello on December 10, 1971 (A69, A70). At this meeting one or two surveilling agents were nearby (A70). The witness spoke to Stoppiello about the quantity of counterfeit and the price (A71). At this occasion this witness also received two spurious bills from Stoppiello (A71); (Government's Exhibit 12 received in evidence subject to connecting the petitioner with the conspiracy; A71, A72, A73). The witness then described the type and nature of counterfeit currency (A73-A75).

On December 30, 1971 Riley, the testifying witness, called Stoppiello and arranged a meeting for January 4, 1972 (A75, A76).

On January 4, 1972 Riley met Stoppiello at Bay Parkway and 72nd Street to acquire additional counterfeit money, the terms of the sale having already been set (A77). Riley was with another agent named Rick Sanno (A77). Seven

other agents were nearby :A78). Riley met Stoppiello and Seminaro (A79). He introduced Stoppiello to Sanno, the other agent (A80). Stoppiello and Seminaro agreed to get the counterfeit and transfer the same to this witness (A81).

In the interim, the agent drove his car around and eventually parked it at a gas station near Avenue O (A81). He left the car and went to a gas station and made a telephone call from a booth located in the gas station (A82). While making the call Riley saw the petitioner drive a green Mustang car (A83). The petitioner "appeared" to be watching him (A83). When Riley completed his call and walked towards the car, the petitioner approached him and gave him a "slight pat down". That is touched him at his waist (A83, A84;. The witness entered his car (A85). There was another individual in the petitioner's car (A85). Meanwhile Riley entered his car and then saw Stoppiello and Seminaro approach. Seminaro entered the witness' car and gave him the counterfeit (A85, A86); (Government's Exhibit 13, A86, A87). This was received subject to connection (A87). Then Riley signaled the other agents and pretended to arrest Seminaro, meanwhile the petitioner and the occupant of the petitioner's car were arrested (A88).

As the trial progressed, the petitioner's trial counsel brought up the issue of the authorities finding counterfeit money in the steering wheel column of the petitioner's car (A98, A99). Counsel explained that the basis of his application to suppress was that the search and seizure of the petitioner's car was made approximately two (2) months after the initial seizure of the petitioner's car (A99). It thus appeared that the petitioner's car was seized by the authorities when the petitioner was arrested on January 4, 1972. The car was held by the government and searched in

March 1972 (A99, A100). The motion was made at the time by the petitioner because the petitioner's trial counsel first found out about the search of the petitioner's car when he was given 3500 materials shortly before he made the motion and that he did not know that the product of the search and seizure was to be part of the government's case (A100, A113, A114).

The government attorney then being asked by the Court under what authority the car was "forfeited" stated "it was never actually forfeited. It was returned to the defendant" (A101).

The Court explained to government counsel that once the car was ascertained to transport counterfeit bills it was subject to forfeiture and that therefore since the car belonged to the government every part of the car would be under the government's control and the government had a right to take it apart. The Court explained that that's not what happened in this case because the defendant was arrested and the agents took full and complete custody of the car but that they had no proof that the car was being used to transport counterfeit bills and then the Court added that as a matter of fact the car was never forfeited (A102).

The Court further stated that the authorities should have gotten a search warrant (A106).

During further argument by the government it was admitted that the complaint against the petitioner in the Magistrate's Court was dismissed (A110). Nevertheless, the car notwithstanding the dismissal of the complaint in the Magistrate's Court, was retained by the government (A110, A111). The Court then stated that there was no ground to

hold the petitioner even after the government had the car and therefore the Court inquired as to what grounds the government had to take the steering wheel apart (A111).

Then the government argued that the government dismissed the case pursuant to the insistence of the Magistrate (A111).

The Court pointed out a difficulty, namely, that the arrest was made in January and the car wasn't searched until March (A111). Further, the Court pointed out that the government didn't proceed with any forfeiture by advertising and therefore the Court believed that the government had no grounds for a forfeiture (A111, A112).

The Court and counsel then formulated the law underlying the disputed issue. That issue was that the basis for determining the legality for the seizure of the car was the government's right to forfeit the car and that the usual law as to search and seizure incident to an arrest was not an issue (A123). Counsel for the government then cited 49 U.S.C. 781 subdivision (a) subsection (3) which related to a forfeiture of a vehicle used to facilitate the transportation, carriage, receipt, concealment, purchase, sale, borrowing, exchange or giving away of contraband (A124, A125). Government's counsel argued that the car was used by petitioner January 24, 1972 to make an observation of Riley, the government witness who testified he was making a telephone call from the public telephone booth; that earlier Riley observed the petitioner's car to be parked several feet behind the agent's car and that the petitioner was in his car at the time and that Stoppiello testified that Mauro was suspicious of the person who was going to make the purchase of the counterfeit currency (A125). Therefore government counsel concluded that the petitioner's car was

being used to insure the safety of the money or the integrity of the transaction and therefore was being used to facilitate what petitioner believed to be a sale (A125, A126). It was then admitted by government counsel that on March 3, 1972 Stoppiello agreed to cooperate with the government and told an agent that the car contained counterfeit currency hidden in the steering column (A127).

Petitioner's trial counsel pointed out this was after the Magistrate dismissed the case in February (A128).

There was further argument by petitioner's trial counsel that the petitioner did not know of the seizure of the bills (A131, A132).

Further colloquy disclosed that the petitioner's attorney discovered the above matter when he was given a copy of the report of an agent during the course of the trial (A138). Furthermore, the Court ruled that the government had the burden on that application to show that the search and seizure was proper (A138).

As to the forfeiture proceeding the government referred to files, Government's Exhibit 36 for identification, that the agents seized the car and turned it over to the Customs Bureau; the government attorney stated this was to show that the forfeiture was intended (A139). Petitioner's trial counsel then stipulated that those files were regularly kept by the Customs Bureau (A140). They were accordingly admitted in evidence as Government's Exhibit 36 (A141).

Government's Exhibit 37 in evidence were files of the Public Stores Sales and Seizures, the Bureau of Customs (A141).

It was again established that the dismissal of this case against the petitioner by the Magistrate was February 15, 1972 (A149).

It was also established that ultimately the government returned the car to the petitioner (A149, A150).

Initially government counsel explained that the case was dismissed in the Magistrate's Court because of the six month rule promulgated by a plan to bring cases on for disposition within six (6) months (A150).

Then the government counsel further explained that:

> "The period between that time, our position vis a vis Mauro, or at least the United States Office position was here is a man who at that time the government had no evidence to go against. My personal feeling was as long as that was the case there was no reason to further harass him by keeping his car."
>
> "Whether or not I was informed of a discovery of the bills in the car shortly after they were discovered . . . and I might say, Your Honor, my reaction to the agent at that time was just the same that you had yesterday."
>
> "I said, 'Why don't you call me up and ask for a warrant before you seized those bills?' . . ." (A154).

Futher colloquy on the part of the government's counsel disclosed that:

"In any event, the car was given back to the man, I suppose not out of any legitimate prosecutorial purpose but simply because we had no case against the fellow at that time and he ought to get his car back, that is all . . ." (A154, A155).

The Court indicated that petitioner and his former attorney knew that the counterfeit currency was concealed in the steering column of the returned car (A156, A157).

The Court denied the motion holding that (A) the car was legally seized because there was proof that the car was used to transfer bills to Stoppiello (A169); (B(the government failed to institute timely forfeiture proceedings, but the petitioner also failed to proceed in timely fashion waiting until March 13, 1972 (A169, A170); (C) the government delay in regard to the impounding of the car was not unreasonable because of a continuing investigation (A170); (D) the return of the car was irrelevant and the government had a right to forfeit the car (A170); (E) the petitioner's motion was not timely made (A171).

Finally, an agent by the name of Giggiano testified that he was a Secret Service Agent and that he became involved in this case initially on January 24, 1972 (A177). That he arrested the petitioner and also Stoppiello (A178).

The car was seized by the agents and was identified by this witness as 1967 Mustang (A179).

That on March 31, 1972 this witness met Stoppiello and as a result of that conversation went to a garage known as "Max Ford's Garage" at Varick Street (A170, A180). The

petitioner's car was there (A180). He searched the car, took apart the steering column and found the counterfeit currency (A180, A181). These were admitted in evidence as Government's Exhibit 38 (A181, A182).

On cross examination, Viggiano testified that on January 4, 1972, he saw the petitioner and his car at 2:30 P.M. (A183, A184). However, he didn't see any spurious currency in the petitioner's car (A184).

Other agents earched the car but found no counterfeit in it (A184, A185).

He next saw the petitioner's car on March 3, 1972 (A185). The Customs Bureau had possession of it from January 4, 1972 to March 3, 1972 (A185). The petitioner was not in possession of that car from the time of his arrest until March 3, 1972 (A186).

The petitioner was not present when the car was searched (A187).

REASONS FOR GRANTING THE WRIT:

A. THE ISSUE OF THE TIMELINESS OF THE MOTION TO SUPPRESS:

Existing Rule 41 subdivision (e) provides that a motion to suppress based on 4th Amendment considerations may be made before trial. The rule further provides an exception to this. An unawareness by the accused of the grounds of the motion is an exception. The rule further permits the Court in its discretion to entertain a motion during the trial.

Proposed rule 12, of the Rules of Criminal Procedure, *supra*, not yet in effect, directs that the time for the motion to suppress be made before trial.

In this case, the trial court heard the motion on its merits during trial. Its denial was on the procedural ground, timeliness, and on the merrits. A reading of the opinion or decision of the Court of Appeals for the Second Circuit discloses that it was concerned with the lack of timeliness of the motion. Be that as it may, nevertheless it would seem that the Court below should have considered the merits of the motion before reaching its affirmance.

The affirmance does not end this matter. In *U.S. v. Robinson*, 361 U.S. 220 (1960) the petitioner filed an untimely notice of appeal so that he could appeal his conviction from the Court of Appeals, District of Columbia Circuit. This Court held that relief was not available and that there could be no appeal. However in thus denying relief the prevailing opinion of this Court noted in footnote 14, page 230:

> "The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: . . .; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U.S.C. Section 2255; and proceedings by way of writ of error coram nobis."

Thus, the issue may arise in this case in regard to collateral relief only this time in the face of an adverse

ruling by the trial court on the merits of the motion but the absence of an appellate consideration. At any rate the Court below created more problems than were solved by its affirmance on the procedural issue. See *Davis v. U.S.*, 41 L.Ed. 2d 109 (1974), (Justice Rehnquist dissenting.) That case dealt with the scope of collateral review of criminal convictions under 28 U.S.C. 2255 and it held that such statute affording post-conviction relief is not limited to consideration of jurisdictional or constitutional claims. The petitioner, however, has only a constitutional claim so that this case is well within the scope of that statute.

Therefore, in the interests of expeditious procedure which is so favored, the Court below should have considered the appeal on its merits and ruled thereon.

As the dissent stated in *Berman v. U.S.*, 378 U.S. 530 (1964), Justices Douglas and Goldberg joining with Mr. Justice Black, at pages 533-534:

> "My belief is that, even if Rule 37(a)(2) is held to require dismissal of this appeal, . . . this Court should remand the case to the Court of Appeals with directions to treat the appeal as an application for collateral relief under 28 U.S.S. Section 2255. Such a course was followed in similar circumstances by the Tenth Circuit in Hixon v. United States, 268 F.2d 667, where, as here, the appeal was late . . . And we said in Bartone v. U.S., 375 U.S. 52 . . .;"
>
> " 'Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral

> proceeding. . . . But the situation is different in federal proceedings over which both the Court of Appeals and this Court . . . have broad powers of supervision. It is more appropriate whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding.' "
>
> "This is precisely what I think should be done in this case, but the Court insists on affirming the harsh action of the Court of Appeals in dismissing the appeal. . ."

It was further stated by Mr. Justice Black in his dissent on pages 537-538 that:

> "Through history men have had to suffer from legal systems which worshiped rigid formalities at the expense of justice. It is for this debt we will remember the Laws of the Meads and the Persians and the injustice borne by the torturous labyrinth of common-law pleading which it took the creation of courts of equity to counteract. Of course, any civilized system of judicial administration should have enough looseness in the joints to avert gross denials of a litigant's rights growing out of his lawyer's mistake or even negligence in failing to file the proper kind of pleading at the prescribed moment . . ." (Citations omitted).

The affirmance in the Court below gave a great deal of weight and consideration to the prospective and proposed rule 12 not yet in effect, so as to allow the government to keep the conviction. This Court allowed the prosecution to retain convictions when it wrestled with the issue of

retroactivity of innovative decisions interpreting certain of the Bill of Rights. See *Michigan v. Tucker*, 417 U.S. 433 (1974). Thus, the prosecution has it both ways.

The issue here is the petitioner's fundamental right of privacy and the integrity of the 4th Amendment. It is put that these are the considerations that survive the niceties of procedure. Even proposed rule 12 bears with its prospectivity, in subdivision (d) (1):

> "(d) Notice by the Government of the Intention to Use Evidence.
>
> "(1) At The Discretion of the Government. — At the arraignment or as soon thereafter as practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b) (3) of this Rule."

The explanation given in the trial court by the defense was that the second attorney the petitioner had did not know of the currency or evidence concealed in the steering wheel apparatus. Nor was there any showing that the petitioner himself was aware of a motion to suppress. As a matter of fact, there was no showing that this particular evidence was to be used by the government.

Since the possible right under proposed Rule 12 is not in effect, the present Rule 41 allowing the motion to be made during trial should be liberarlly construed. Rule 2 of the Rules of Criminal Procedure clearly provides that the purpose of the Rules, among other things, is to provide for fairness in the administration of justice.

As was held in *DiBella v. United States*, 369 U.S. 121 (1962) at page 129 thereof, footnote 9:

> "Although Rule 41 (e) . . ., codifies prior practice in preferring that the motion be raised before trial, and provides for the taking of evidence on disputed factual issues, the usual procedure followed at this early stage is to decide the question on affidavits alone; in addition, it has long been accepted that the point can, and on occasion must, be renewed at the trial to preserve it for ultimate appeal. *Gouled v. United States*, 255 U.S. 298 . . .; *Lawn v. United States*, 355 U.S. 339 . . . . We do no more than recognize that ordinarily the District Courts will wish to reserve final fuling until the criminal trial."

As this Court held in *Jones v. U.S.*, 362 U.S. 257, 264 (1960):

> ". . . this qualification, proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement."

Present counsel who was trial counsel for petitioner was retained after a prior attorney who represented the petitioner was discharged. Petitioner's counsel argued at the trial court that he did not know that the counterfeit currency was found concealed in the steering column of the seized automobile. Further, it was argued that at that time the car was already in the possession of the petitioner after the seizure of the concealed evidence. The issue in this case was that since there is a fundamental constitutional right involved, that right could not be forfeited by counsel for petitioner. The record here is silent as to just why the first

trial attorney did not communicate this fact to petitioner's trial counsel (A133, A137, A160, A161, A164).

Nor was the omission to make the pre-trial motion an element of trial tactics and strategy. See *Henry v. Mississippi*, 379 U.S. 443 (1965), rehearing denied 380 U.S. 926. In that case, a constitutional question was presented by the petitioner. The respondent argued that since there was a state trial, state law governed and the denial of the enforcement of the federal constitutional right rested on state procedural grounds. However, this Court held to the contrary on pages 451-452. This Court stated that:

> "Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims . . ., we think that the deliberate bypassing by counsel of the rule as part of the trial strategy would have that effect on this case."

It was not shown anywhere in this case that the failure to make the motion prior to trial was "trial strategy". See *Kaufman v. United States*, 394 U.S. 217 (1969 at page 221). See also *Himmelfarb v. United States*, 175 F.2d 924 (Cir. 9th-1949), at page 931.

The Court of Appeals for the Second Circuit in *U.S. v. Calabro*, 467 F.2d 973 (1972), considered the issue as to the scope of an attorney's authority in respect to waiving the rights of an accused. On pages 985-986 it was recognized that:

> "The American Bar Association Project on the Standards for Criminal Justice concludes that a

> defendant is entitled to make the ultimate decision only in regard whether to plead guilty, whether to waive a jury, and whether to testify: 'all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client' . . ."

There was no proof that the petitioner and his trial counsel consulted in regard to this omission.

Nor was there any proof in this case that in regard to the basic right of privacy and in regard to due process of law to the 5th Amendment to the Federal Constitution, counsel or the client adopted as part of its strategy the foregoing of the motion to suppress prior to trial reserving that issue for the trial itself. The record is completely mute that petitioner even if he knew that the counterfeit currency was concealed in the car, that he had a right to move to suppress or avail himself of safeguards that should be adopted in regard to the trial disclosure of this evidence by the government. A waiver of a fundamental right is ineffective unless it is made knowingly; see *Johnson v. Zerbst*, 304 U.S. 458. A waiver of a fundamental right cannot be accomplished upon a "silent record", see *Boykin v. Alabama*, 395 U.S. 238, 242, 243 (1969).

Nor can the petitioner himself be faulted. There was no showing that the petitioner knew the requirements of Rule 41, *supra*. There was no showing that trial counsel was instructed to move to suppress by the petitioner. There was no showing that the petitioner even if he might have known about the recovery of the concealed counterfeit knew that it was to be used in evidence against him, or alternatively, knew the remedies open to him in regard to the seizure. The Second Circuit itself, in the recent holding of *U.S. v.*

Tramnunti, 500 F.2d 1334 (1974), stated on page 1340 in part that:

> " . . . the government argues that the appellant himself, . . ., obviously must have known that he was the beneficiary of whatever immunity he was granted. Although Tramunti is hardly a stranger in the criminal courts, we are loathe to attribute to him the legal sophistication necessary to appreciate, particularly while the subject of a vigorous cross-examination, the circumstances under which he testified in 1966, seven years before . . ."

Since there is a presumption against a waiver of a fundamental right, the courts below should have held or directed to be held a full evidentiary hearing to ascertain just why there wasn't a motion made before trial. The first counsel for the petitioner did not raise this issue. In this respect therefore the petitioner was unrepresented by counsel during a vital stage of a criminal prosecution. Second, counsel claimed that he did not know of the retrieving of this particular item of the government's evidence until during the trial when he read documents given to him under 18 U.S.C. 3500. It clearly was upon the government to establish a knowing and conscious waiver and to produce evidence to rebut the presumption against such waiver.

B. THE ISSUE OF THE ILLEGAL SEARCH AND SEIZURE:

The trial court which determined the motion adversely to petitioner but also on the merits, relied on the forfeiture statutes found in 49 U.S.C. 782 and 782, *supra*.

The forfeiture statutes do not provide for any evidentiary standard to validate the seizure of a car and its subsequent forfeiture. The 4th Amendment to the Federal Constitution generally provides that a search and seizure to be proper has to be based upon probable cause. That is probable cause must be the basis for the issuance of a search warrant among other things. In this case there was no search warrant but it would nevertheless seem that probable cause is the underlying standard. Put another way, there can be no lesser requirement in the absence of a search warrant than in the case where a search warrant is issued. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

It may be recognized and indeed it is, that the automobile today is an integral part of the average American's way of life. It is further put to this Court that it is the material embodiment of the fundamental right to travel; see *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griffin v. Breckenridge*, 403 U.S. 88, 105, 106 (1971).

In *Clay v. U.S.*, 239 F.2d 196 (Cir. 5th, 1956) at pages 200-201 it was held that:

> "If officers have the right to interfere with the essential pursuit of a nation of automobilists, it must be based on what is known or reasonably believed before the commandeering starts. To allow justification to arrest on discovery after intrusion would permit 'the government . . . to justify the arrest by the search and at the same time to justify the search by the arrest' . . ."

At the time the car was seized, there was not one iota of evidence and there was no probable cause that the vehicle contained any contraband. The fact that a car may be

driven to the site where a crime is being committed, does not warrant the seizure of the car on the grounds of a statutory forfeiture. In *Howard v. U.S.*, 423 F.2d 1102 (Cir. 9th, 1970), Howard was arrested driving a Chevrolet which contained narcotic drugs. The Chevrolet was under prior observation by the authorities who saw it entering the United States from Mexico and being driven by a government informant who left it at a place designated by a person whom the informant telephoned. Later, Howard came to the area of the Chevrolet arriving there in a Buick automobile which he parked near the Chevrolet. He entered the Chevrolet and drove it from the place he parked his Buick and was ultimately arrested and searched. In searching Howard, the authorities seized the key to the Buick. Using these keys the authorities entered the Buick, drove it to a parking lot and then searched it, finding narcotic drugs. It was held that the search of the car, the Buick, which the accused drove so that he could have access to the Chevrolet was void. The court held that there was no warrant to search the Buick, the search was not incident to the arrest, and there was no consent to search. It was held further that the basis for the search was that it was an incident to a seizure of an automobile under the forfeiture provisions of 49 U.S.C. 781 and 782. The court reasoned that the seizure was valid only if the authorities had probable cause to believe that the Buick had been used to "facilitate" the transportation of the narcotics in the original car, the Chevrolet, that was driven over the United States border, see page 1103. It was then stated on pages 1103-1104 that:

> ". . . there was no evidence that the seizing officers had cause to believe that the Buick then contained, or ever had contained, contraband. Nor was there any evidence that an illegal transaction had taken

> place within the vehicle. The government proved merely that the officers at the time of the seizure knew that Howard had driven the Buick car to the location of the load car. . . ., the seized car was merely the means of locomotion by which the person suspected of participating in illegal drug traffic reached a site of that activity. The ease or the difficulty of transporting the marajuana in the Chevrolet was not effected by the manner in which Howard reached the load car. The use of an automobile to commute to the scene of the crime does not justify the seizure of that automobile under Sections 781 and 782 . . . (Citations and internal quotations omitted).

In this case on January 4, 1972 the time of the arrest of the petitioner and the seizure of the car, there was no evidence whatsoever that the petitioner used the car as a storage place for contraband or counterfeit. The most that the authorities could claim was that the petitioner arrived at the scene in an automobile. The government during the argument of the application at the trial court never even advanced the argument that the car was seized because it contained any contraband. Rather the government argued that the car was used to "facilitate" the possible transfer of the currency or to protect the possessors of it (A125-A126). It is now put that because of the widespread use of automobiles, anyone's automobile can be seizued if that person, prior to commiting a crime and after a crime arrives at the scene in an automobile. An automobile under those circumstances is not the means of carrying out the crime, it is not an integral element of the operation to effectuate the crime. It may be the means of travel to the scene of the crime, but that is happenstance. It is not an ingredient of the commission of the act. Persons can go to

the scene of the crime by public transportation or by walking. Because of the drastic nature of a forfeiture, it is respectfully submitted that to effect the forfeiture of a vehicle the government must be put to stringent proof and the statutes be narrowly construed.

It is respectfully submitted that the issue was wehther the agents knew at the time of the seizure that the car contained the contraband. There is no evidence in this record that there was such knowledge. As a matter of fact, the court in denying the motion stated that the investigation was a continuing one. The trial court in denying the motion further held that the authorities had a right to seize the car under a forfeiture statute, hold the car because the investigation was continuing and thus ultimately investigate further to ascertain whether the car contained the forfeiture. It may be recognized that a search is good or bad from its commencement, not what it produces.

What actually happened here was not the conventional search and then seizure of contraband as incidental to a warrantless arrest, rather there was initially a search for no cause, a retention of the seized car for two months, a search of the seized car, and ultimately an indictment against the petitioner. However, the 4th Amendment mandates that both the search and seizure be valid. As was stated in *U.S. v. Jeffers*, 342 U.S. 48 (1951), at page 52:

> ". . . we do not believe that events are so easily isolateble. Rather they are bound together by one sole purpose to locate and seize the narcotics of respondent. The search and seizure are, therefore incapable of being untied. . . ."

The authorities in this case did not know at the time of the seizure of the car that it contained any counterfeit currency. Therefore, there was no probable cause to seize the car. Even in automobile cases where courts recognize that the mobility of a car is an exception to the warrant requirement of the 4th Amendment to the Federal Constitution, it has nevertheless been held that to justify the seizure of a car there had to be probable cause that the car contained the contraband subject to the seizure. See *Dyke v. Taylor Implement Manufacturing Co.*, 391 U.S. 216, pages 221-222; *Chamber v. Maroney*, 399 U.S. 42, at pages 46-47. See also *U.S. v. Bailey*, 458 F.2d 408 (Cir. 9th, 1972; at page 410.

In *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973), an automobile was stopped 25 miles from the Mexican border by a "roving" border patrol of the United States Immigration Service. The car was searched for aliens. The authorities had no warrant, and there was no probable cause to believe that the ultimate accused committed any offense. The search revealed that the car contained narcotics. The government argued that the authorities had a right to stop the automobile under the Immigration and Nationality Act, found in 8 U.S.C. 1357(a) which provided for the warrantless searches of automobiles within a reasonable distance of the boundary of the United States. The opinion in that case recognized that the stop and search of a moving automobile could be made without a warrant, and held that this was a narrow exception to the warrant requirements of the 4th Amendment to the Federal Constitution. But this court also stated on page 269 that that doctrine did not:

> "declare a field day for the police in searching automobiles. Automobile or no automobile, there

must be probable cause for the search . . ."

and on page 272 this court added that:

"It is clear, of course, that no act of Congress can authorize a violation of the Constitution . . ."

The prevailing opinion in that case also stated that:

"The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels the resolute loyalty to Constitutional safeguards . . . "

In *U.S. v. McCormick*, July 17, 1974, Cir. 9th, reported in 15 Criminal Law Reporter, 2433, it was ruled that the federal forfeiture statutes are constitutional but nevertheless are governed by 4th Amendment considerations. In that case the defendant's automobile was parked in front of his house and was seized on the theory that it contained contraband. The authorities had no warrant. It was held that in construing the forfeiture statutes, the case law as to search and seizure governed. Furthermore, the fact that an automobile is involved does not necessarily make a warrantless search a valid exception to the general requirements of the 4th Amendment. The court further stated that it was relying on *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 633, which held that an automobile is not the obvious and apparent type of contraband subject to search and seizure, but is derivative contraband.

Therefore, the subsequent search of the automobile in this case remote in time and place from the initial arrest of

the petitioner and the seizure of the car was void. At the very least the authorities should have procured a search warrant. This is argued because the car was already in the possession of the authorities, the car was stationery and the authorities should have therefore first made application to procure a search warrant to dismantle that portion of the car where the currency was said to have been concealed. See *Coolidge v. New Hampshire*, 403 U.S. 443.

In *Cardwell v. Louis*, 41 L.Ed. 2d 325 (1974) there was no decisive ruling by this court in a case which involved the seizure of an automobile from a murder suspect who was in custody where the authorities actually had a warrant of arrest. The issue in that case was whether under the 4th Amendment the authorities had a right to seize the automobile and examine its exterior at a police impoundment area where the car was removed from the parking lot where it was initially left by the suspect. The authorities had probable cause for the arrest of the suspect and they also had probable cause to believe that the car was being used in the commission of a crime being investigated because a similar automobile was observed leaving the scene of the crime, and the color of the suspect's car was similar to the color of the paint scrapings from the victim's car and lastly that the suspect's car was recently repaired and certain portions of it were altered, thus showing a consciousness of guilt on the part of the suspect. The suspect was invited by the police to appear at headquarters and he drove his car to the headquarters, parking it at a public lot half a block away. Later in the afternoon the suspect was arrested pursuant to an arrest warrant. Prior to his arrest he was permitted to call his lawyer and attorneys actually appeared on his behalf at the time of the formal arrest. At the time of the arrest his car keys and the parking lot claim check were released to the police and the

authorities arranged for the car to be transported to an impoundment area. The next day the authorities examined the exterior of the car and procured evidence from the paint scrapings.

Notwithstanding these facts, there was no majority opinion in this court. Mr. Justice Blackmun offered an opinion sustaining the police procedures and this was joined in by the Chief Justice of this Court and Justices White and Renhquist. Mr. Justice Powell did not join in that opinion but would sustain the conviction on the grounds that the case came up by way of a writ of habeas corpus to test the conviction, Mr. Justice Powell being of the opinion that the Court should not have entertained the case. Four other justices in an opinion by Mr. Justice Stewart, held that the procedures violated the 4th Amendment to the Federal Constitution. That opinion held that the authorities should have first procured a search warrant. It was recognized by Mr. Justice Stewart that there was ample opportunity for the police to first procure a search warrant and that the fact that an automobile was involved did not remove the case from the general warrant requirements of the 4th Amendment.

As a matter of fact in this case the prosecution at the trial court admitted that the U.S.Attorney told the agents after the discovery of the evidence that they should have gotten a warrant before they made the seizures (A154). The prosecutor explained to the trial court that he was in error; that he thought a warrant was required to make a seizure in the car until he read a case. Meanwhile the trial court told the prosecutor that the case he read was irrelevant (A154). Furthermore, the prosecutor admitted that at the time the car was returned to the petitioner it was because the government had no case against the petitioner (A154, A155).

Notice should be taken that in this case petitioner was first indicted in July following his initial arrest in January 1972. The dismissal of the charges against him at the Magistrate's Court was had in February 1972. The examination of the car was in March 1972. Therefore, the government openly admitted that there was no probable cause to hold the petitioner at the time of his arrest and at the time of the seizure of the car.

Under the circumstances of this case the initial arrest of the petitioner was therefore void because it was not founded on probable cause. The dismissal of the case by the Magistrate constituted, it is submitted, res adjudicata that there was no probable cause to hold petitioner. There can be no probable cause therefore for the holding of the car which was incident to the arrest not founded on probable cause. Probable cause it is submitted, under the 4th Amendment to the Federal Constitution, the governing standard to determine the validity of an arrest where the authorities have no arrest warrant. See *Davis v. Mississippi*, 394 U.S. 721; *Wong Sun v. U.S.*, 370 U.S. 471.

Since petitioner was first indicted the June following the January arrest and seizure of the car, there is thus ample showing that the prosecution did not even have the minimum evidence required to support a valid indictment.

Nor did the government institute timely proceedings to validate the forfeiture as required under 49 U.S.C. 784. See also 19 U.S.C. 1604.

CONCLUSION:

It is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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